

May 2, 2006
revised August 1, 2006

PINELANDS COMMISSION

Pinelands Comprehensive Management Plan

Height Limitations

Adopted Amendments: N.J.A.C. 7:50-5.4

Proposed: November 7, 2005 at 37 N.J.R. 4133(a)

Adopted: May 12, 2006 by the New Jersey Pinelands Commission,
John C. Stokes, Executive Director

Filed: July 28, 2006 **with technical changes** not requiring additional public notice

Authorized by: New Jersey Pinelands Commission.

Authority: N.J.S.A. 13:18A-6j.

Effective Date: August 21, 2006

Expiration Date: Exempt.

Summary of Public Comments and Agency Responses:

The New Jersey Pinelands Commission (Commission) is adopting amendments to subchapter 5, Minimum Standards for Land Uses and Intensities, of the Pinelands Comprehensive Management Plan (CMP). The amendments were proposed on November 7, 2005 at 37 N.J.R. 4133(a) and relate to local communications facilities (cellular towers) in the Pinelands.

In association with publication of the proposed amendments in the November 7, 2005 issue of the New Jersey Register, the Pinelands Commission transmitted the proposal to each Pinelands municipality and county, as well as to other interested parties, for review and comment. Additionally, the Pinelands Commission:

- Sent notice of the public hearing to all persons and organizations which subscribe to the Commission's public hearing registry;
- Placed advertisements of the public hearing in the five official newspapers of the Commission, as well as on the Commissions own web page;
- Submitted the proposed amendments and new rules to the Pinelands Municipal Council pursuant to N.J.S.A. 13:18A-7f;
- Distributed the proposed amendments to the news media maintaining a press office in the State House Complex;
- Published a copy of the proposed amendments on its web page at www.nj.gov/pinelands; and
- Distributed press releases concerning the proposed amendments and new rules to the news media

A formal public hearing was held before the Commission staff on December 7, 2005. Approximately 10 people attended the hearing; oral testimony on the rule proposal was provided by three individuals. The hearing officer's recommendations are in accordance with the public comment and agency responses and agency-initiated changes below.

Oral comments were recorded on magnetic tape which is on file at the Commission's office at 15 Springfield Road, New Lisbon, New Jersey. The record of this rulemaking is available for inspection in accordance with applicable law by contacting:

Betsy Piner
Pinelands Commission
P.O. Box 7
New Lisbon, NJ 08064.

Summary of Public Comments and Agency Responses:

The Commission accepted written comments by regular mail, facsimile or e-mail on the November 7, 2005 proposal through January 6, 2006.

The following persons submitted written comments on those proposed amendments related to local communications facilities (an asterisk indicates those persons who submitted oral comments as well):

1. Babinski, Judith Ann; Pitney Hardin LLP, Cingular Wireless*
2. McGlinchey, Edward J., Secretary, Pinelands Municipal Council
3. Sachau, B.
4. Stilwell, Warren; Czura Stilwell LLC, Cingular Wireless*
5. Zublatt, Alan B.; Verizon Wireless and Sprint Nextel Corporation*

The Commission's response to the comments is set forth below.

1. **COMMENT:** General support for all of the proposed amendments was submitted by one party. (2).

RESPONSE: The Commission appreciates the support of this party.

2. **COMMENT:** Three parties objected to the proposed amendments at N.J.A.C. 7:50-5.4.(c) relative to local communications facilities, citing numerous and specific issues with the proposed amendments which are summarized and addressed in sections 3-8 of this notice of adoption. One of the parties also submitted an alternative set of local communications facilities regulations for the Commission's consideration. All of the parties asked the Commission not to proceed with adoption of the proposed amendments at this time but to table the amendments and engage in discussions with the parties with the goal of developing a different and mutually acceptable approach. (1, 4, 5)

RESPONSE: While not in agreement with many of the contentions of these parties, the Commission recognized the importance of affording adequate time and effort to address the issues raised by these parties, as well as the benefits which might result from a more comprehensive analysis of the Commission's local communications facility regulations. Therefore, the Commission delayed adopting the proposed amendments to the CMP for several months and instead reviewed the alternate regulatory approach suggested by one of the parties, explored examples that might illustrate how a solution to the particular siting issues noted herein might be approached, and further examined the proposed rule language to ensure it was clear and met the Commission's intent. The feasibility of developing a revised, comprehensive approach to local communications facilities in the Pinelands was discussed with interested providers, however, little support for this

approach was offered. During the delay and since the public hearing, the Commission's staff conducted a great deal of research on technology and approaches used in other jurisdictions, arranged and held a meeting with the industry to discuss various options, followed up with an educational workshop with the industry, and consequently offered several suggestions and opportunities to the industry on how solving a particularly difficult siting case could possibly lead to improved regulatory language. Finally, the clarifying language included in this rule adoption was provided to industry representatives. Unfortunately, the industry did not choose to capitalize on these opportunities. Ultimately, therefore, it became clear that the development of a mutually agreeable, revised and comprehensive regulatory approach was not possible at this time. Indeed, the discussions to date only highlighted the need for the clarifications, improvements, and amendments to be adopted as soon as possible. The Commission is therefore proceeding with adoption of the proposed amendments. To the extent the industry is forthcoming, the Commission will continue to work with the industry which may resolve any remaining differences either under the proposed rules or with possible future CMP amendments.

3. **COMMENT:** Three parties objected to the proposed amendments at N.J.A.C. 7:50-5.4.(c) relative to local communications facilities on the basis that they were characterized in both the rule proposal and the resolution adopted by the Commission to authorize said rule proposal as mere clarifications when in fact

some of them represent significant departures from current CMP requirements. (1, 4, 5).

RESPONSE: The Commission adopted a resolution in September of 2005 which authorized the proposal of amendments to the CMP, including amendments referred to as “clarifying standards related to local communications facilities”. The specific standards being amended relative to local communications facilities and a complete description thereof were set forth in the rule proposal authorized by the Commission through that action. The rule proposal itself referred to the various proposed amendments related to local communications facilities as clarifications, improvements and amendments of the CMP. This rule proposal was specifically referenced in the Commission’s resolution and it is clear from the record established at the various public meetings leading up to the Commission’s adoption of the resolution that the Commission was fully aware of the nature of the amendments being proposed.

All of the changes to N.J.A.C. 7:50-5.4(c) were accomplished through the formal rulemaking process. Therefore, the Commission fails to see the distinction which the commenters are attempting to make or the purpose for doing so. In any case, the Commission followed all relevant OAL rules for consideration of any type of amendment to the CMP and its action on these amendments was entirely proper.

4. **COMMENT:** Two parties objected to the amendments being made at N.J.A.C. 7:50-5.4(c)3 and 5.4(c)4vii which require that if more than one location

(be it an existing structure or site for a new tower) is identified as being feasible from a technical perspective for the location of a local communications facility antenna or tower, the location which offers the least potential for visual impacts on various roads, low intensive recreation facilities, campgrounds, wild and scenic rivers, residential dwellings and certain special Pinelands resources must be utilized. One party requested that the amending language be deleted in its entirety from both sections. The other party suggested that language be added to indicate that the providers should be required to choose only between those existing structures or sites which offer the same coverage and reasonable lease terms and conditions. (1, 5)

RESPONSE: The Commission does not believe it would be appropriate to base any CMP standard on the ability of a particular industry to obtain what it believes are reasonable lease terms or conditions. N.J.A.C. 7:50-5.4(c)3 requires that antennas be located on existing structures *to the extent practicable*. The amendments now being adopted simply state that if there is more than one such existing structure *available for use*, the one with the least potential for visual impacts must be used. Obviously, if a structure or site is not available for the location of an antenna or construction of a new tower, be it due to technical operating requirements or financial arrangements, the Commission cannot require its use. From the outset, the Commission has interpreted its regulations to require that the providers site their facilities in the least visually intrusive manner, not only on a particular structure or site but when choosing among structures and sites

which are equivalent in terms of providing coverage. The amendments being adopted makes this requirement explicit and the Commission continues to believe they are wholly appropriate as written.

5. **COMMENT:** One party requested that N.J.A.C. 7:50-5.4(c)4vi(1), which is being amended to allow new local communications facilities to be located on the parcel of existing commercial or industrial uses in Rural Development Areas be further expanded to allow facilities at such sites in the Preservation Area District and Forest Area as well. (5)

RESPONSE: The Commission does not believe that such an amendment would be appropriate. Commercial and industrial uses are permitted throughout the Rural Development Area by the CMP (N.J.A.C. 7:50-5.26), as is the municipal establishment of commercial and industrial zoning districts. Therefore, allowing local communications facilities, one type of commercial use, in certain locations within this Pinelands management area is only logical. This is not the case in the Preservation Area District or Forest Area where commercial and industrial uses are largely considered nonconforming and a municipality's ability to establish a commercial or industrial zone is very limited. In addition, the Preservation Area District and Forest Area are conservation-oriented areas containing sensitive and important Pinelands resources which require protection from development and the potential visual impacts resulting from local communications facilities.

6. **COMMENT:** Three parties objected to the amendments at N.J.A.C. 7:50-5.4(c)6 which modify the requirements which comprehensive plans for local

communications facilities must meet and the standards which will be applied to individual applications for the development of local communications facilities. One of these parties stated that the amendments should not be adopted at all and asserted that they constitute an outright departure from the regulatory scheme embodied in the CMP in that they would allow multiple shorter facilities in certain visually sensitive areas rather than requiring the least number of local communications facilities necessary to provide adequate service. This party contended that it would be fundamentally unfair and legally improper for the Commission to retroactively require facilities that had been mapped as part of an approved comprehensive plan to utilize shorter multiple facilities or alternate technology. This party further stated that the use of multiple shorter facilities will not permit collocation and therefore cannot accommodate the needs of other local communications providers, thereby necessitating perhaps double or triple rows of antennas and leading to visual clutter. In addition, this party asserted that a requirement for the use of multiple shorter facilities or alternate technologies violates the Telecommunications Act and the Wireless Communication and Public Safety Act and that by requiring a specific technology (Distributed Antenna Systems or DAS), the Commission has invaded an exclusive field reserved for regulation by the Federal Communications Commission. Two parties suggested that the phrase “multiple shorter facilities or alternate technologies” be replaced with “stealth technology” and that the Commission be empowered to *suggest*, rather than require the use of stealth technology in discussing applications for

development of new towers with applicants. Finally, two of the parties objected to the use of multiple, shorter facilities on the basis that this would necessitate separate negotiations and leasing agreements for each site, adding to economic and administrative overhead for both the providers and local planning and zoning boards. (1, 4, 5)

RESPONSE: To the extent that the local communications facilities identified in previously approved plans can be sited in accordance with N.J.A.C. 7:50-5.4(c)4, N.J.A.C. 7:50-6 and the CMP's visual impact standards, the amendments will have no effect at all. It is only in those cases where the need for a new facility was acknowledged in an approved plan but no site is available which is consistent with all CMP criteria that the providers will be required to consider alternatives to satisfy the need identified in those plans. The amendments are merely intended to facilitate implementation of approved plans by recognizing in the regulations that there is a need to broaden the search for alternatives when CMP criteria cannot be met. As was made clear during the Commission's review and approval of the previous comprehensive plans, individual wireless facilities still must be approved by the Commission in accordance with the provisions of N.J.A.C. 7:50-5.4 and other applicable CMP standards. Approval of a comprehensive plan does not constitute development approval for any particular site. Instead, it "enables" the providers to look for a site that meets the CMP's siting criteria, and, on that site, to exceed the 35 foot height limitation. In fact, the Commission's right to condition development approvals in certain cases on the use

of less obtrusive facilities wherever preservation of a viewshed is paramount was explicitly stated in the approval of AT&T's amendment to the PCS Comprehensive Plan in 2003. The Commission has become aware that there are a few facilities identified in the three approved comprehensive plans which are currently unlikely to be able to be sited in accordance with all CMP standards. The amendments were the Commission's attempt to recognize that fact by providing itself and the industry with specific regulatory flexibility to consider alternatives. The Commission's primary concern remains the scenic resources of the Pinelands.

For these very unique areas which cannot comply with the current rules and where protection of these resources requires additional administrative work on the part of the carriers, local boards and the Commission, the Commission considers that extra time and expense to be well worth the effort. It is envisioned that the number of alternatives that need to be evaluated will be few and site specific, and could include consideration of different macrosite configurations and perhaps other technologies. The charge to the applicant will be to minimize, or where necessary, avoid, visual impacts. Alternatives will be selected based upon the site, the current state of available technology, and visual impacts.

A great deal of concern was expressed by the commenters that the Commission was effectively requiring the use of DAS technology in certain locations. It must be emphasized that the amendments to N.J.A.C. 7:50-5.4(c)6 were not intended to dictate the use of any particular technology or solution to the siting dilemmas facing certain local communications facilities. Rather, they were

intended to require that a full range of available solutions and alternatives at least be considered by the Commission and the industry. No particular solution or technology is prescribed; therefore, the Commission disagrees with the contention that the amendments violate the Federal Telecommunications Act or Wireless Communication and Public Safety Act. Instead, the solution that meets technical operating and adequate service requirements (either on its own or in combination with other measures which may prove necessary due to the potential use of shorter facilities), is economically practical (although not necessarily the least costly), and best protects the scenic resources of the Pinelands will be selected. In order to make this clear, N.J.A.C. 7:50-5.4(c)6 is being further amended to specify that a full range of alternatives which meet the technical operating and adequate service requirements previously identified for a facility must be considered, including stealthing, multiple shorter facilities, use of sites not normally authorized by the CMP and alternate technologies. Adequate service is a term used throughout N.J.A.C. 7:50-5.4(c) and is specifically described at 5.4(c)1 as that which “serves the local communication needs of the Pinelands, including those related to public health and safety.” The use of these alternatives may be required by the Commission in its review of a future comprehensive plan or development application. “Stealthing” is a general term used by the industry and is a means of mitigating visual impacts, essentially by camouflaging or hiding a tower. It can be broadly or narrowly defined, and, as was stated by one of the commenters at the public hearing on the proposed amendments, could even mean the use of two

shorter towers rather than one tall one. However, the Commission believes that the term is somewhat ambiguous and the proposed wording in this adoption notice is clearer. Finally, in terms of colocation, the Commission recently learned that newer DAS technology may accommodate multiple users. Thus, colocation on DAS does not appear to be an issue. Use of shorter macrosite facilities also may not pose a problem because of newer technology but will, in any event, be dealt with in the rare application where it may be an issue.

7. **COMMENT:** Three parties objected to the amendments at N.J.A.C. 7:50-5.4(c)6v which clarify the obligations of both the industry when an amendment to an approved local communications facility comprehensive plan is submitted for review and the Commission during its review of such an amendment. Two of the parties stated that changes to the previously approved comprehensive plans should not be made without full agreement from all the participants in those plans. These parties contended that the providers have vested rights in the development of the facilities specified in their respective comprehensive plans and that these rights would be abrogated if subsequent plan amendments were allowed without a consensus of the affected carriers. Two of the parties recommended that the section be modified to require agreement by all the original participants in a previously approved plan before any proposed amendment which “changes” an approved local communications facility or proposes additional facilities could be submitted to the Commission for its approval, with no such agreement required for

other types of amendments that do not involve relocation or elimination of facilities. (1, 4, 5)

RESPONSE: The intent of the amendments was to preclude the possibility that one provider could block submission of an amendment by a competitor; therefore, the requirement for joint agreement to the submission of an amendment was deleted. At the same time, a sentence was added to N.J.A.C. 7:50-5.4(c)6v to clarify that the Commission would consider any information or comments submitted by other local communications providers during its review of an amendment. The Commission agrees that amendments to the previously approved comprehensive plans which would effectively “harm” one or more of the original siting decisions should not be allowed. Therefore, in recognition of the valid concerns raised by the commenters, N.J.A.C. 7:50-5.4(c)v is being further clarified to indicate that one of the Commission’s primary focal points during its review of a proposed amendment will be information submitted by approved plan participants describing how a proposed amendment would impact the location of or necessity for a facility included in a previously approved plan.

8. **COMMENT:** One individual stated that the proposed amendments relative to local communications facilities at N.J.A.C. 7:50-5.4(c) should take into account the impacts of cellular towers on birds and wildlife. (3)

RESPONSE: Local communications facilities and all other development in the Pinelands Area must adhere to the environmental standards of the CMP,

including those related to the protection of rare plants and animals and their habitats. The proposed amendments do not change that requirement.

Federal Standards Statement

Section 502 of the National Parks and Recreation Act of 1978 (16 U.S.C. §471i) called upon the State of New Jersey to develop a comprehensive management plan for the Pinelands National Reserve. The original plan adopted in 1980 was subject to the approval of the United States Secretary of the Interior, as are all amendments to the plan.

The Federal Pinelands legislation sets forth rigorous goals which the plan must meet, including the protection, preservation and enhancement of the land and water resources of the Pinelands. The adopted amendments were designed to meet those goals by establishing revised standards for the development of local communications facilities in the Pinelands.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks “[thus]”.):

7:50-5.4 Height limitations

(a)-(b) (No change.)

- (c) The height limitation in (a) above shall not apply to the antenna and any supporting structure of a local communication facility of greater than 35 feet, provided that:
- 1.-2. (No change).
 3. The antenna utilizes an existing communications or other suitable structure, to the extent practicable. Should there be more than one such existing communications or other suitable structure available for use, the antenna shall utilize that structure which offers the least potential for visual impacts on those uses and resources listed in 4.ii. through v. below;
 4. If an existing communications or other suitable structure cannot be utilized, the antenna and any necessary supporting structure is located such that it:
 - i.-iv. (No change.)
 - v. Minimizes visual impacts as viewed from existing residential dwellings located on contiguous parcels through adherence to the buffer and setback requirements established in the certified land use ordinances of the municipality in which the facility is proposed to be located;
 - vi. If proposed in the Preservation Area District, Forest Area, Special Agricultural Production Area, or Rural Development Area, is located in one of the following areas:

- (1) In a certified municipal commercial or industrial zone. If the facility is proposed in the Rural Development Area, it may also be located on the parcel of an existing commercial or industrial use, whether or not that use is included in a certified municipal commercial or industrial zone. If the facility is proposed in an industrial zone within the Forest Area or Preservation Area District where resource extraction is the primary permitted use, the facility shall be located on the parcel of an approved resource extraction operation in accordance with (c)4vi(3) below;

(2)-(5) (No change.)

- vii. Should there be more than one location which meets the requirements set forth in 4i. through vi. above, the antenna and any necessary supporting structure shall be sited at that location which will have the least visual impact on those uses and resources described in 4ii, iii. and v. above.

5. (No change.)

6. If the facility is proposed to be located in any Pinelands management area other than a Regional Growth Area or a Pinelands Town, a comprehensive plan for the entire Pinelands

Area must be submitted to the Pinelands Commission for certification. If the facility is proposed to be located in a Military and Federal Installation Area, submission of such a plan shall only be required if the facility is to be located outside the substantially developed area of the installation. Said plan shall include five and 10 year horizons, a review of alternative technologies that may become available for use in the near future, and the approximate location of all proposed facilities. Said plan shall also demonstrate that the facilities to be located in the Preservation Area District, Forest Area, Special Agricultural Production Area and Pinelands Villages of Bamber Lake, Beckerville, Belcoville, Belleplain, Brookville, Chatsworth, Dorothy, Eldora, Elwood, Estell Manor, Green Bank, Jenkins, Lower Bank, North Dennis, Sweetwater, Warren Grove and Weekstown are the least number necessary to provide adequate service, taking into consideration the location of facilities outside the Pinelands that may influence the number and location of facilities needed within the Pinelands. Said plan shall also demonstrate likely consistency with (c)1, 3, and 4 above and note the need to demonstrate consistency with (c)2, 3, 4 and 5 when the actual siting of facilities is proposed when an application for development is submitted to the Commission pursuant to N.J.A.C. 7:50-4. If a proposed new facility cannot be sited in

accordance with the requirements of 4vi above or the minimum environmental standards established in N.J.A.C. 7:50-6, or if a proposed new facility would have a significant visual impact on those uses and resources described in 4ii. through v. above, the plan shall specify how the use of ***alternatives which would meet the technical operating and adequate service requirements identified for the new facility*** *[multiple shorter facilities or alternate technologies]* could result in reduced visual impacts*, **including but not limited to stealthing, multiple shorter facilities, use of sites not listed in 4vi above and alternate technologies***. The Commission may require the ***implementation of the alternative that is technically and economically feasible, and that will result in the greatest avoidance or minimization of visual impacts*** *[use of multiple shorter facilities or alternate technologies]* during its review of ***the plan or*** any application for development ***of a local communications facility*** submitted pursuant to N.J.A.C. 7:50-4.

Where more than one entity is providing the same type of service or has a franchise for the area in question, the plan shall be agreed to and submitted jointly by all such providers, where feasible, and shall provide for the joint construction and use of the least number of facilities that will provide adequate service by all providers for the

local communication system intended. Shared service between entities, unless precluded by Federal law or regulation, shall be part of the plan when such shared services will reduce the number of facilities to be otherwise developed.

i.-iv. (No change.)

v. Applicants may propose amendments to an approved plan from time to time. Any such amendments shall be sent by the applicant via certified mail to all of the local communications providers who provide the same type of service or have a franchise within the Pinelands Area for their review and comment. Operators with newly awarded franchises that did not participate in the development of the original plan shall be given the opportunity to participate in the proposal of amendments. In the event that any provider declines to participate in the amendment process, the Commission may proceed with its review of the amendment. The Commission may consider in its review of the amendment any information submitted by other local communications providers*, **particularly information which demonstrates that a proposed amendment would impact the location of, or necessity for, a local communications facility included in a comprehensive**

plan previously approved by the Commission pursuant to (c)6 above*. All amendments shall be reviewed by the Commission according to the requirements set forth in (c)6 above and according to the procedures set forth in (c)6i through iii above.

7. (No change.)

(d) (No change.)